Supreme Court, U.S.
FILED
JUL 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 85-1563

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,
Respondent.

On Writ of Certiorari to the
California Supreme Court

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BRIEF FOR THE CRIMINAL JUSTICE LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

****

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QUESTION PRESENTED

1. Whether a jury instruction given during the sentencing phase of a death penalty trial not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling violates the Eighth Amendment to the United States Constitution where the state's death penalty statute and the jury instructions which explain its provisions require the trier of fact to consider any aspect of the defendant's character or record and any of the circumstances of the offense that might extenuate the gravity of the crime.

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INTEREST OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

The Criminal Justice Legal Foundation is a non-profit law firm organized to advance the public's interest in a

system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

Interpretation of California's death penalty initiative, as well as all legislation concerning the imposition of the ultimate sanction, is a matter of the greatest concern. If there is to be a death penalty, as the California electorate and their representatives have demonstrated time and again over the past decade, care must be taken that it be interpreted and applied rationally and consistently. Misinterpretation can lead to an erroneous finding of a violation of the Eighth Amendment to the United States Constitution. Such a result would not meet the public interest in the existence of a death penalty.

CJLF's interest in the present case is premised on the public concern that a death penalty exist, and that its application be as free as possible from arbitrary factors.

SUMMARY OF ARGUMENT

During the past decade, this Court has emphatically urged the critical importance of a defense counsel's ability to personalize a capital defendant in a death penalty trial as a means of obtaining an alternative sanction to capital punishment in a given case. However, the concept of individualized sentencing must be viewed in light of the basic principle that unguided, arbitrary, and wanton jury discretion has no place in the sentencing process.

It is urged that an instruction that the sentencing jury "not be swayed

by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," does not violate the dictates of this Court's precedent when given with other admonishments which expressly and unambiguously instruct the sentencing body to consider any mitigating circumstance relating to the offense or the offender.

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT CONSTITUTIONAL ERROR BY INSTRUCTING THE JURY NOT TO BE INFLUENCED BY SYMPATHY, PASSION, PUBLIC OPINION, ETC., IN LIGHT OF SUPPORTING INSTRUCTIONS WHICH INFORMED THEM OF THEIR DUTY TO CONSIDER ALL RELEVANT ASPECTS OF RESPONDENT'S CHARACTER AND THE CIRCUMSTANCES OF HIS CRIME

A common doctrinal thread runs throughout the evolution of the Eighth Amendment process in the context of capital sentencing. Beginning with the seminal case of Furman v. Georgia 408

U.S. 238 (1972), invalidating then existing death penalty statutes, the pluralicy concerned itself primarily with the arbitrariness evident in the imposition of capital sentences. The Furman requirement of guided discretion was based on the need to purge arbitrariness and caprice from the capital sentencing decision and to establish a "meaningful basis for distinguishing the few cases in which ... [the death penalty] is imposed from the many cases in which it is not." (Id. at p. 313.) This demand for consistency and reliability has been a constant theme in death penalty litigation and literature. (Rudin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U. Pa. L. Rev. 989, 995 (1978).) Furman's, basic message was clear - that guided capital

sentencing discretion was an Eighth Amendment requirement (408 U.S. at 257).

In Gregg v. Georgia 428 U.S. 153 (1976) Justice Stewart (writing for the plurality) reiterated Furman's principle that the death penalty must not be imposed in an arbitrary or capricious fashion. Instead "the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant" (Id. at p. 199, emphasis added). Accordingly, Gregg, identified four basic themes which would frame all subsequent capital sentencing adjudications: consistency, individualization, weighing of aggravating and mitigating circumstances, and appellate review of capital sentencing (Id. at pp. 188-95). By identifying these factors, the Gregg

plurality clarified the Eighth Amendment procedural rationale initiated in Furman.

In two other cases decided in 1976 this Court sought to guarantee not only objective but particularistic imposition of the death penalty by striking down a series of state death penalty statutes which mandated uniform application of the death penalty to all persons convicted of committing certain categories of murder (e.g., Roberts v. Louisiana 428 U.S. 325 (1976); Woodson v. North Carolina 428 U.S. 280 (1976)). Mandatory death penalty schemes were held violative of the Eighth Amendment's protection against the arbitrary imposition of capital punishment. In so holding, this Court effectively required states to develop approaches that provided for a structured exercise of dis-

cretion while still guaranteeing individualized sentencing (Gregg v. Georgia 428 U.S. 153, 195 (1976); Proffitt v. Florida 428 U.S. 242, 258 (1976); Jurek v. Texas 428 U.S. 262, 271 (1976)).

Interpreting Furman as seeking to reduce sentencer arbitrariness, rather than eliminating all sentencing discretion, Justice Stewart in Woodson v. North Carolina 428 U.S. 280 (1976) concluded that low visibility decision-making resulting from such mandatory provisions offended the Eighth and Fourteenth Amendments:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense ... treats persons convicted of a designated offense

> not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> (Id. at p. 304; emphasis added.)

Accordingly, individual consideration of mitigating and aggravating circumstances was treated as a "constitutional imperative" (Id.), and the "fundamental respect for humanity" rationale was deemed an independent justification for requiring individualized capital sentencing procedures (Id.). In short, the Eighth Amendment requires as "constitutionally indispensable" a consideration of each individual offender's character and record as well as the circumstances surrounding his or her offense (Id.).

Lockett v. Ohio 438 U.S. 586 (1978), was an important step in the constitutionalization of death sentencing procedures. Once again, the primary concern was the attainment of "a greater degree of reliability when the death sentence is imposed" (Id. at p. 604). Specifically, the jury's consideration of the defendant's character and the particular circumstances of the crime was deemed necessary to assess the applicability of available corrective techniques and post conviction remedies:

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques - probation, parole, work furloughs, to name

a few - and various postconviction remedies may be available to modify an initial sentence of confinement in non-capital cases. The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence. (Id. at p. 605.)

Thus, a sentencing jury's consideration of any mitigating circumstance relevant to the character and record of the individual offender and the circumstances of the particular offense was held to be imperative to a guided, yet individualized sentencing procedure (Id. at pp. 601-604).

Godfrey v. Georgia 446 U.S. 420 (1980) reiterated the Eighth Amendment requirement of consistency and reliability by invalidating a death sentence imposed on the basis of a vague construction of a statutory aggravating circumstance. The death penalty provision in question was held unconstitutional as applied by the Georgia Supreme Court because the discretion permitted would condone the imposition of the death penalty based on caprice or emotion rather than reason (Id. at p. 433).

Analyzed together, Lockett, supra and Godfrey reaffirm the importance of an individualized sentencing procedure and define the parameters of the jury's discretion. When determining whether death is an appropriate penalty, the jury is thus provided with the oppor-

tunity to objectively assess every nuance of both the defendant's character and the circumstances surrounding his offense.

Finally, in Eddings v. Oklahoma 455 U.S. 104 (1982), a majority of the Court expanded the Eighth Amendment process rationale to require consideration of all relevant mitigating evidence. Implicit in its holding is the notion that a jury's decision-making function should not be guided by wholly irrelevant matter not bearing on the defendant or the circumstances of the offense; it was the sentencer's failure to consider all relevant evidence that was deemed reversible error (Id., at pp. 114-115). Thus, although Eddings, in effect, broadened the scope of mitigating factors that must be considered by the sentencing authority, it did not

sanction a decision-making process based on unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. As urged in Zant v. Stephens 462 U.S. 862 (1983), "... the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime (Id., at p. 878-879, emphasis added).

As Justice Marshall noted in Zant, supra:

> If this Court's decisions concerning the death penalty establish anything, it is that a capital sentencing scheme based on "standardless jury discre-

> tion" violates the Eighth and Fourteenth Amendments.
>
> (462 U.S. at p. 905, Marshall J., dissenting.)

Furthermore,

> As this Court's decisions establish, the focus of the sentencer's attention must be directed to specific factors whose existence or nonexistence can be determined with reasonable certainty.
>
> (Id. at p. 917, Marshall, J., dissenting.)

Again, in California v. Ramos, 463 U.S. 992, 1021-1022 (1983), Justice Marshall noted:

> Since any factor considered by the jury may be decisive in its decision to sentence the defendant to death ... the jury

clearly should not be permitted to consider just <u>any</u> factor. Rather, it should only be permitted to consider factors which can provide a principled basis for imposing a death sentence rather than a life sentence....

[T]he Constitution forbids the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty. Our cases establish that a capital sentencing proceeding should focus on the nature of the criminal act and the character of the offender .... The Court has thus stressed that the

appropriateness of the death penalty should depend on "relevant facets of the character and record of the individual offender .... The requirement that the jury focus on factors such as these is designed to ensure that the punishment will be 'tailored to [the defendant's] personal responsibility and moral guilt'."

(Id., Marshall, J., dissenting, emphasis original.)

As a result, a sentencing process that mandates or encourages a jury's reliance on mere sympathy, passion, prejudice, public opinion, or the like would constitute a departure from the kind of individualized focus required in capital sentencing. Likewise, a procedure which guards against the imposition

of a death sentence based upon a consideration of factors having absolutely no relation to the nature of the offense or the character of the individual is entitled to constitutional approbation where the sentencer is otherwise clearly informed of its constitutional duty to consider in mitigation all relevant aspects of the defendant's character and the circumstances of his crime.

A review of the sentencing scheme in effect at the time of Respondent Brown's trial, read in conjunction with the jury instructions reveals accord with the decisional authority discussed above.

The California death penalty statute applicable at Respondent's trial expressly permitted him at sentencing to offer evidence "as to any matter relevant to ... mitigation ... including,

but not limited to, the nature and circumstances of the present offense, ... and the defendant's character, background, history, mental condition and physical condition" (Cal. Pen. Code § 190.3). This same statute also provided:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true ...
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or

violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(Id.)

At the sentencing phase of Respondent's trial, the jury was read CALJIC No. 8.84.1 (4th ed. 1979). This instruction closely paralleled the above quoted statutory language, clearly advising the trier of fact of its obligation to consider in mitigation all relevant aspects of Brown's character and the circumstances of his crime.

In construing subdivision (k) of CALJIC No. 8.84.1, the California Supreme Court in People v. Brown 40 Cal.3d 512, 537 (1985), expressed the fear that when read with the anti-sympathy warning, it would "divert the jury from its constitutional duty to

consider 'any [sympathetic] aspect of the defendant's character or record'..." (Id.).[1] It is respectfully submitted that such a construction is unreasonably narrow. The California Supreme Court's reasoning implies that jurors are without intelligence or common sense. A more reasonable reading leads to the conclusion that each juror is to consider any circumstance, whether relating to the offender or the offense.

As mentioned earlier, CALJIC 8.84.1 closely parallels the statutory language

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[1] Subdivision (k) advised the jury to consider "any ... circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (See also Cal. Pen. Code § 190.3 subd(k), supra.)

of Cal. Pen. Code § 190.3. In California v. Ramos 463 U.S. 992 (1983), this Court cited the very same provisions and noted:

> [R]espondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of Lockett v. Ohio, 438 U. S. 586 ... The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in this case.
>
> (California v. Ramos, supra at 1005, n. 19; See also, Pulley v. Harris 465 U.S. 37, 53 (1984), upholding § 190.3.)

Furthermore, CALJIC No. 8.84, held by the state supreme court to be uncon-

stitutional, is not inconsistent in any way with the aforementioned statutory provisions. More significantly, it did not advise the jury to ignore any relevant evidence or mitigating circumstance. Instead, it simply cautioned the jury not to be swayed by "mere sentiment, conjecture, sympathy ...."

Such an instruction should not be viewed in total isolation but rather in conjunction with the multitude of unambiguous instructions given at the same time. The net affect is to preclude the jury from wandering beyond the realm of relevancy and to focus their attention on the evidence and the reasonable inferences to be drawn therefrom. In this respect, it is consistent with Justice Steven's observation in Gardner v. Florida 430 U.S. 349, 358 (1977) that

"[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Id.)

In his dissenting opinion in People v. Bandhauer 1 Cal.3d 609, 619-620 (1970) [83 Cal. Rptr. 184, 463 P.2d 408], Justice Mosk recognized that in practical terms, such an instruction could only help capital defendants by reducing the possibility that sentencing juries will be swayed by sympathy for the victim, along with other adverse forms of "passion, prejudice, public opinion or public feeling":

> Realistically viewed, the instruction ... is, on balance, favorable to the defendant. Of the various influences proscribed, "sentiment" is vague

and "conjecture" is neutral, but "passion, prejudice, public opinion or public feeling" are most often hostile to the defendant. I doubt, for example, that the majority would sanction an instruction which affirmatively authorized the jury to be governed by such "passion, prejudice, public opinion or public feeling." This leaves "sympathy" as the majority's main concern. But even that emotion, I submit is more likely to be evoked in favor of the innocent victim and his family than of the criminal whom the jury has convicted of the offense.

(Id.)

Mosk's concerns were reiterated in People v. Easley 34 Cal.3d 858 (1983)

[196 Cal. Rptr. 309, 671 P.2d 813] where he wrote:

> In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.
>
> (Id. at 886.)

In essence, the "sympathy" admonishment, in addition to the mass of penalty phase instructions given at Brown's trial, effectively precluded the jury from considering factors that might have harmed him and thus avoided the sort of "freakish," and unguided

decision-making that Furman and its progeny sought to eliminate. "Sympathy ... is not a characteristic of the defendant; it is an emotion of the jurors. Thus, when jurors were cautioned not to be swayed by sympathy, they were not being instructed to ignore thoughtful and dispassionate consideration of the defendant's proffered mitigation. They were merely admonished to employ reason, not emotion. That is sound advice in a court of law. Justice Cardozo reminded us: 'The balance is swayed, not by gusts of fancy, but by reason.' (Cardozo, Growth of the Law (1924) p. 58.)

"...[I]f jurors are permitted - indeed, encouraged - to entertain emotion in assessing penalty, in most instances they are likely to order death for the miscreant." (People v. Lanphear

36 Cal.3d 163, 170 (1984) [203 Cal. Rptr. 122, 680 P.2d 1081] (Mosk, J., dissenting).)

Sister jurisdictions in accord include Nevius v. State 699 P.2d 1053 (Nev. 1985); People v. Del Vecchio 475 N.E.2d 840 (Ill. 1985).

CONCLUSION

This Court has repeatedly insisted that the sentencing decision be based on the facts and circumstances of the individual and his crime (Spaziano v. Florida 468 U.S. ___ (1984), [82 L.Ed.2d 340, 352, n. 7, 104 S.Ct. 3154, cases cited therein). In this regard it must be concluded that the sentencing instruction complained of by Respondent passes constitutional muster.

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DATED: July 16, 1986.

Respectfully submitted,

CHRISTOPHER N. HEARD,
Legal Director

By Christopher N. Heard
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No. 85-1563
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I, THE UNDERSIGNED, declare under penalty of perjury that the following is true and correct.

I am a citizen of the United States, over 18 years of age, not a party to the subject cause, and employed by the Criminal Justice Legal Foundation in which County the below stated mailing occurred. My business address being 310 J Street, Suite 310, Sacramento, California, 95814.

I have served the within BRIEF OF AMICUS CURIAE as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C., 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Said envelopes were then sealed and with first class prepaid postage deposited in the United States mail by me at Sacramento, California, on the 16th day of July, 1986.

L. Evangeline Roberts
L. EVANGELINE ROBERTS

DATED: July 16, 1986.

OFFICIAL SEAL
KIMBERLY M. SCOTT
NOTARY PUBLIC-CALIFORNIA
SACRAMENTO COUNTY
MY COMM. EXPIRES DEC. 11, 1987

(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of Sacramento, personally appeared L. EVANGELINE ROBERTS, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.